

Supreme Court, U.S.

FILED

MAR 7 1979

IN THE SUPREME COURT OF THE UNITED STATES, JR., CLERK

October Term, 1978

No. **78-1371**

NICHOLAS BUIAN

Petitioner

-VS-

CLIFFORD BAUGHARD, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For The Sixth Circuit

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In The Supreme Court Of The United States

October Term, 1978

No.

NICHOLAS BUIAN

Petitioner

-vs-

CLIFFORD BAUGHARD, GEORGE BLAND, JOHN
BAILEY, HELMUT KLEMM, JACK MOYE, ROBERT
W. WHEELER AND ROBERT D. HARRIS,

Respondents

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For The
Sixth Circuit.

To: The Honorable Chief Justice of the United States
and the Associate Justices of the Supreme Court
of the United States.

The petitioner prays for a writ of certiorari to
review the order of the United States Court of Appeals
for the Sixth Circuit entered in the above-entitled
cause on January 9, 1979.

Opinions Below

The District Court entered an order dismissing
the invasion of privacy claim of the complaint against
the policeofficer respondents, and overruled the
petitioner's motion for an order to set aside the jury
verdict of nominal damages and to render a judgment
for non-punitive damages in his favor, or, in the
alternative, for a new trial on the issue of damages.
The Court of Appeals affirmed the orders and the
judgment of the District Court. No opinion was issued
by the Court of Appeals. The District Court rendered
an opinion with its order dismissing the invasion of
privacy claim of the complaint, and did not give an
opinion concerning the order overruling the motion
to vacate and set aside the verdict of the jury on
damages, or, to order a new trial on the issue of
damages.

The orders and judgment of the lower courts
appear in the Appendix hereto, A-8-14; A-17-18;
A-24; A-25-26; A-27.

Jurisdiction

The order of the Court of Appeals was entered on January 9, 1979. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1). Petitioner's request for a rehearing in banc was denied on February 6, 1979.

Questions Presented

1. Whether public dissemination of certain intimate and sensitive information concerning the private affairs of the petitioner by police officers, absent legitimate law enforcement justification, implicated the petitioner's liberty interest in his good name, reputation, honor or integrity, and deprived him of his property interest in his employment as secured to the petitioner by the Fourteenth Amendment.

2. Where, in a 42 U.S.C., Section 1983 action for damages, a jury found that the petitioner did not resign as the personnel director of Akron, Ohio, and concluded that the respondents, Jack Moye and Robert

Wheeler, deprived the petitioner of a constitutional right guaranteed to him by the Fourteenth Amendment, is the petitioner entitled to the non-punitive damages which he proved by undisputed evidence that he suffered as a consequence thereof.

Statutory Provisions Involved

42 U.S.C., Sections 1983 and 1988, appear in the Appendix.

Statement of the Case

This is a civil action arising out of a Civil Rights complaint under 42 U.S.C., Section 1983 and its jurisdictional counterpart, 28 U.S.C., Section 1343, seeking compensatory and punitive damages against certain police officers of the City of Akron, Ohio, and from the members of the Civil Service Commission of the City.

The District Court found, on a motion to dismiss, that the complaint does not state a constitutional claim

of invasion of privacy against the police officers defendants, and dismissed the claim in this respect against them. The motions to dismiss of the defendants, on other grounds, were denied.

The action was tried by a jury of six. During the trial, the court dismissed the police officers as defendants with the exception of defendant, Helmut Klemm, who was exonerated by the jury. The defendant, Robert Harris, a third member of the Civil Service Commission, was dismissed during the trial by the petitioner. The jury found against the remaining defendants, Jack Moye and Robert Wheeler, and in favor of the petitioner on the constitutional claim. The district judge instructed the jury that the petitioner may be compensated for the loss of wages and for mental suffering only "if (they) find by the preponderance of the evidence that the plaintiff was deprived of a hearing and further find that if a hearing were held the Civil Service Commission would have determined

from the facts that the plaintiff was wrongfully discharged" "So if you get to this issue, you must determine if the plaintiff was wrongfully discharged, in other words, knowing the facts the Commission would not have discharged the plaintiff in a hearing" (Appendix, A-15). The petitioner excepted to the jury instructions of the court (Appendix A-16). The jury, thereupon, awarded the petitioner the sum of One Dollar (\$1.00) nominal damage and Six Hundred Fifty Dollars (\$650.00) punitive damages against each defendant. The court entered judgment on the verdict of the jury. The petitioner moved the court for an order to set aside the verdict of the jury on the issue of damages and to render a judgment for damages in his favor, or, in the alternative, to order a new trial on the issue of damages. These motions were denied.

The Court of Appeals, in an order entered without an opinion, held:

I. The dismissal of the invasion of privacy claim against the police officers "was consistent with the

principles set forth in Paul v. Davis, 424 U.S. 693 (1976)", and, such claims "therefore, were outside any constitutionally protected zone of privacy and consequently did not entitle him to relief under Section 1983".

II. "The jury verdicts were consistent with the evidence and with the standards of Carey v. Piphus, 435 U.S. 247 (1978)".

The judgment and orders of the District Court were, therefore, affirmed by the Court of Appeals.

The petitioner was employed as the Personnel Director of Akron, Ohio, under a contract with the Civil Service Commission of Akron ever since May 10, 1965. The contract was in force and effect at the time of the petitioner's termination on March 21, 1977.

In March, 1977, the police-respondents conducted an investigation of a certain homicide during which they came into possession of photographs and learned about certain affairs of the petitioner's private life. The petitioner was not involved in the homicide or connected with it in any way. The police, nevertheless, publicly

revealed the photographs and disclosed the information which they acquired "under color of law". The dissemination of the confidential information by the police-respondents caused the President of the Civil Service Commission, respondent Jack Moye, to request and insist upon the immediate resignation of the petitioner as Personnel Director. Thereupon, the petitioner submitted a letter of resignation to the respondent Moye on March 17, 1977. Three days thereafter, and prior to a specially scheduled and convoked meeting of the Civil Service Commission to act on the resignation, the petitioner withdrew the letter of resignation and notified the president, respondent Moye, the vice-president, respondent Wheeler and the law director of the city that he intended to remain in the position and to continue to perform the duties of personnel director. The respondent, Jack Moye, nevertheless, advised the Commission at the meeting of March 21, 1977, that the petitioner had resigned as personnel director, but he

did not disclose or present to the Commission the letter of withdrawal of the resignation which was served on him, the respondent Wheeler and the law director, and he deliberately concealed from the Commission the information that the petitioner did not and would not surrender the position of personnel director. The Commission, at the March 21st meeting proceeded in disregard of the withdrawal of the resignation and named an interim personnel director, and subsequently hired a permanent replacement for the petitioner.

In his suit herein, the petitioner alleged that the action of the respondents in causing his termination as the Personnel Director of Akron, Ohio, was taken in reckless disregard of the petitioner's constitutional rights. A threshold question arose with regard to the legal consequences of the withdrawal of the offer to resign. Petitioner conceded that the successful prosecution of his civil rights complaint was dependent upon an initial determination that the petitioner did not

resign and did not surrender the position of personnel director. The parties agreed that the issue of resignation should be resolved prior to the trial, and, therefore, stipulated that the question be submitted to the court as an issue of law. The parties agreed further that the complaint would be dismissed if the court decided that the withdrawal of the letter of resignation by the petitioner was ineffective and a nullity. Upon consideration of this issue, the district judge concluded that the question was one of fact to be submitted to the jury for a decision. At the trial, the jury found that the petitioner did not resign as personnel director and rendered a verdict in his favor on the constitutional claim.

The petitioner's performance as personnel director was considered outstanding and exemplary by the members of the Commission. At each meeting which considered and renewed the petitioner's contract of employment, the members praised his work and commended him for his performance as director.

"A superb job", "Very proud of the accomplishments of the Director and his staff", "excellent leadership", "proud of what Mr. Buian has done for the department", were some of the expressions of the Commission members throughout the years.

The unrefuted testimony established that the petitioner would have stayed on as personnel director until January, 1985. In this respect the district judge stated at the side bar: "(From) opening statement there was evidence submitted in this case about the loss of earnings, and there wasn't an objection one time until just a moment ago (which was overruled)". And continuing, the judge remarked: ". . . Also evidence has been entered relative to this (loss of earnings) all over the place" (Appendix A-28).

Reasons For Granting The Writ

The order of the Court of Appeals, affirming the judgment and orders of the District Court, is in clear and direct conflict with the decisions of this Court in

Paul v. Davis, 424 U.S. 693 (1976) and in Carey v. Phipps, 435 U.S. 247 (1978).

I

In Paul v. Davis, 424 U.S. 693, Mr. Justice Rehnquist, in the Court's majority opinion, held:

"Reputation alone, apart from more tangible interests, such as employment, does not implicate any 'liberty' or 'property' interests sufficient to invoke the procedural protection of the Due Process Clause; hence, to establish a claim under Section 1983 and the Fourteenth Amendment more must be involved than simply defamation by a state official".

In the instant case, more is involved than simply defamation - a "more tangible interest" is present - the loss of employment and the deprivation of other employment opportunities. The complaint reveals the following: During the investigation of a homicide, and incident thereto, the police-respondents found and took possession of photographs of a sensitive and intimate nature in which the petitioner appeared. The petitioner was absolved of any connection with the criminal act. Absent any law enforcement proceedings implicating

the petitioner, the police-respondents "made the photographs of the plaintiff (petitioner) accessible and/or delivered, and/or exhibited them to the other defendants, and to individuals at random, and, simultaneous.y therewith, improperly and unlawfully disclosed and made known publicly the information about the private and intimate activities and conduct of the plaintiff which they obtained in the course and as a result of the investigation of the aforesaid homicide, all without the knowledge or consent of the plaintiff and in wanton and reckless disregard of the plaintiff's rights". The actions and conduct of the police - respondents were the direct cause of the abrupt and summary termination of the petitioner's employment as personnel director and of his inability to obtain other work. The question thus presented is: Whether public disclosure by the police-respondents of the intimate private life of the petitioner, and the intrusion by them upon his seclusion or solitude, or into his

private affairs, under the circumstances herein, violated the constitutional rights of the petitioner.

This Court stated in Piphus, at page 253:

"The legislative history of Section 1983. . . . demonstrates that it was intended to 'create a species of tort liability' in favor of persons who are deprived of 'rights, privileges or immunities secured to them by the Constitution' ".

The specie of tort liability in our situation was characterized by this Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) as "the right to be free from unwanted publicity about his private affairs, which although wholly true, would be offensive to a person of ordinary sensibilities". It would appear, we submit, that the police-respondents violated the petitioner's "right to be free from unwanted publicity about his private affairs" and that such violation deprived him of the rights secured to him by the Constitution.

In Joint Anti-Fascist Comm. v. McGrath, 341, U.S. 123, 168, Mr. Justice Frankfurter declared:

"Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential".

In Paul v. Davis, Mr. Justice Rehnquist commented on the aforesaid statement and said that it referred (pp. 708, 709):

"to the fact that governmental action taken in that case (Constantineau, 400 U.S. 433) deprived the individual of a right to purchase or obtain liquor in common with the rest of the citizenry. 'Posting', therefore, significantly altered her status as a matter of law, and it was that alteration of legal status, which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The 'stigma' resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think such defamation, standing alone, deprived Constantineau of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment".

The unjustified public disclosure of the private affairs of the petitioner precipitated the arbitrary and summary termination of the petitioner's employment as the Personnel Director of Akron, Ohio. This governmental action deprived the petitioner of his

contractual rights to the position of personnel director. The termination of the petitioner significantly altered his status as a matter of law, and it was that alteration of legal status, which, combined with the injury resulting from the defamation (loss of employment), justifies the invocation of procedural safeguards.

At the time of the events set forth in the complaint, the petitioner was employed as Personnel Director twelve consecutive years. He was under a contract which was renewable upon satisfactory performance every three years. Petitioner testified that he intended to stay on the job until January, 1985. This testimony is unrefuted.

The arbitrary termination of the employment and the unlawful discharge under the circumstances of the case, and the inability of the petitioner to obtain other employment, significantly implicate substantial

tangible interests of the petitioner which are entitled to the protection of the Due Process Clause. The photographs and information of the private and intimate affairs of the petitioner which the police-respondents acquired under color of law, were of a delicate and confidential nature, and should not have been revealed publicly except pursuant to legitimate legal process. The damaging effect of such public disclosure on the petitioner's continued employment, reputation and psychological well-being, as shown, invaded the petitioner's rights to privacy and constituted an unwarranted violation of his constitutional rights. Board of Education v. Roth, 408 U. S. 564 enunciates the principle that the government's attack on one's reputation may infringe constitutionally protected liberty in two respects: (1) Governmental degradation of one's standing in the community may be a denial of his "liberty", (2) Governmental communication of derogatory information to employers may be an attack

on "liberty". The Court in Olmstead v. U. S., 277 U. S., 478, declared pertinent hereto:

"Every unjustifiable intrusion by the government upon the privacy of an individual, whatever the means employed, must be deemed a violation of the Fourteenth Amendment. "

Mr. Justice Brennan in his dissent in Paul stated:

"Certainly the enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and, therefore, as falling within the concept of personal liberty".

II

The Court of Appeals concluded that "the jury verdicts were consistent with the evidence and with the standards of Carey v. Phipps". The Court, however, did not elaborate on its conclusion so that we may know what it considered to be "the standards of Carey v. Phipps".

The district judge instructed the jury that the petitioner would be entitled to no more than nominal damages unless he proved and the jury found that "if a hearing would have been held he would not have been

discharged, in other words, knowing the facts the Commission would not have discharged the plaintiff (petitioner) in a hearing. This charge was motivated by the Judge's reading of the decision in Piphus, although, the judge did not indicate to counsel, in connection with the discussions on the jury instructions, that he would charge the jury on the basis of Piphus as he understood the decision. Piphus was decided by this Court on March 28, 1978, and the instant case was tried on April 26, 27 and 28 of 1978. Counsel for the petitioner did not know of Piphus prior to the trial, and the citation of the case was not made known to him by opposing counsel or the judge during the trial.

In Piphus, the district court declined to award damages to the complaining students because they "put no evidence in the record to quantify their damages". Thus, their claim for damages failed for complete lack of proof. The Court of Appeals reversed the District Court, and held that general compensatory damages

must be awarded in a Civil Rights action under Section 1983 without proof of actual injury where there has been a violation of the Civil Rights Act.

This Court granted certiorari "to consider whether in an action under Section 1983 for the deprivation of procedural due process, a plaintiff must prove he actually was injured by the deprivation, before he may recover 'non-punitive' damages". The purpose of an award of damages under Section 1983, as declared by this Court, is to compensate persons for injuries that are caused by the deprivation of constitutional rights, and, further, that plaintiffs are required to prove not only that their rights were violated, but also that an injury was caused by the violation in order to recover substantial non-punitive damages.

The petitioner did prove that he was terminated without due process of law, and, that as a direct result thereof, he lost the income represented by the salary of the position and has been prevented from securing

other gainful employment. The wrong or injury to the petitioner effected damages to him in dollars and cents. The jury found that the respondents, Jack Moye and Robert Wheeler, deprived the petitioner of his constitutional rights. By reason of this finding, the respondents became liable to the petitioner for all the damages which are a natural consequence of the violation. It follows, we believe, that the jury was required to award the petitioner the undisputed damages which were proven once it concluded that there was a deprivation of the petitioner's constitutional rights. On the subject of Section 1983 damage awards, the Court in *Piphus* declared at pages 254, 255:

"Our legal system's concept of damages reflects this view of legal rights. 'The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty', 2 F. Hayer & F. James, Law of Torts, Section 25, 1, p. 1299 (1956). The Court implicitly has recognized the applicability of this principle to actions under Section 1983 by stating that damages are available under that section for actions 'found . . . to have been violative of

constitutional rights and to have caused compensable injury . . . ' ", *Wood v. Strickland*, 420 U.S., 308, 319 (1975), *Codd v. Velger*, 429 U.S. 624, 630-631 (1977).

The undisputed evidence established that the violation of the petitioner's constitutional rights caused him "compensable injury". Yet, the Court of Appeals held that the "jury's verdicts were consistent with the evidence". The question thus presented is: Must a court correct a jury's verdict of nominal damages where there is undisputed and credible evidence in the record of substantial and precise damages which resulted from and are a consequence of the deprivation of a constitutional right? Mr. Justice Black stated the guiding principle in such a situation in *Bell v. Hood*, 327 U.S. 678, 684 (1946) as follows:

" where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. "

The District Court in our case refused to set aside the jury verdict of nominal damages in the face of the unrefuted proof that the petitioner sustained non-punitive damages due to the actions of the respondents', Moye and Wheeler, which the jury found "to have been violative of (petitioner's) constitutional rights". The order of the District Court in this respect was affirmed by the Court of Appeals on the ground that the jury verdict of nominal damages was "consistent with the evidence and the standards of Carey v. Phipps "

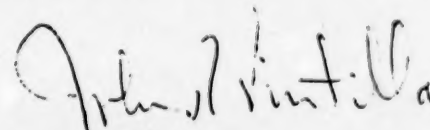
With regard to the use of additur in a situation such as ours, this Court, in Dimick v. Schiedt, 293 U.S. 474, 478, remarked:

"So it has been held in some of the old cases that where the amount of plaintiff's demand was certain, as for example, in an action of debt, the court had authority to increase or abridge the verdict of the jury, Mayne's Treatise on Damages, 571, Sayer's Law of Damages, 177".

Conclusion

For the reasons stated, a writ of certiorari should issue to review the order below.

Respectfully Submitted


John R. Vintilla
Attorney for Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NICHOLAS BUIAN
752 Cliffside Circle
Akron, Ohio,

Plaintiff,

-vs-

CLIFFORD BAUGHARD
City-County Safety Building
217 South High Street
Akron, Ohio

GEORGE BLAND
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217 South High Street
Akron, Ohio

JOHN BAILEY
City-County Safety Building
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Akron, Ohio

HELMUT KLEMM
City-County Safety Building
217 South High Street
Akron, Ohio

JOHN DOE
City-County Safety Building
217 South High Street
Akron, Ohio

JACK MOYE
517 Seaman Avenue
Akron, Ohio

ROBERT W. WHEELER
900 Memorial Parkway
Akron, Ohio

ROBERT D. HARRIS
797 Nome Avenue
Akron, Ohio,

Defendants.

C77-287

CASE NO.

JUDGE CONTIE

COMPLAINT

Aug 1 2 29 PM '77
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

FILED

A

Plaintiff, for his complaint, alleges as follows:

1. The Court has jurisdiction of the action under Title 28 of the U. S. Code, Sections 1331 and 1343, and the action arises under Title 42 of the U. S. Code, Sections 1983 and 1985.

2. The matter in controversy exceeds ten thousand dollars (\$10,000.00) exclusive of interest and costs.

3. This is a proceeding to redress the violation of rights guaranteed to the plaintiff by the Constitution of the United States, in particular, the right of privacy which is protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to said Constitution, and the right to due process of law under the 14th Amendment.

4. At all times pertinent to the complaint, the plaintiff was the duly appointed and acting Personnel Director of the City of Akron, Ohio, by virtue of a contract of employment with the Civil Service Commission of Akron, Ohio, whereby his employment as such was secured to December 31, 1978.

5. Defendant, John Doe, whose identity could not be discovered by, and as yet unknown to the plaintiff, is a police officer of the City of Akron, Ohio, and who acted as hereinafter set forth, under color of law, in concert with the other defendants and at their direction and/or under their control.

6. The defendants, Clifford Baughard, George Bland, John Bailey, Helmet Klemm and John Doe, at all times relevant herein, were the Police Captain, Police Sergeant and police officers, respectively, of the City of Akron, Ohio, and in doing the acts and things herein-after set forth, the defendants were acting under color of the statutes, ordinances, regulations, customs and usages of Ohio and the City of Akron, and by virtue of the authority vested in each of them by law.

7. The defendants-police officers, while in the course of their duties in the investigation of a certain homicide of one Musa A. G. Albarr, formerly known as Richard Thompson, which occurred on March 7, 1977, and during a search in connection therewith of the premises occupied by the said decedent, found and took possession of certain photographs of a private and intimate nature in which the plaintiff appeared.

8. The investigation by the police-defendants of the subject homicide established that the plaintiff was not involved and that he was not connected in any way with the death of Musa A. G. Albarr.

9. Shortly after the said defendants took possession of and while the aforesaid photographs were under their control, and after said defendants cleared the plaintiff of any involvement in the subject homicide,

the exact time or date being unknown to the plaintiff, the said defendants made the photographs of the plaintiff accessible, and/or delivered, and/or exhibited them to the other defendants, and to individuals, at random, and, simultaneous therewith, and thereafter, the police officer-defendants and the other defendants, improperly and unlawfully disclosed and made known publicly the information about the private and intimate activities and conduct of the plaintiff which was obtained in the course and as a result of the investigation of the aforesaid homicide, all without the knowledge or consent of the plaintiff and in wanton and reckless disregard of the plaintiff's rights.

10. On March 20, 1977, at or about 9pm o'clock, while the plaintiff was in pursuit of a personal errand, and, as he was about to enter into his automobile which was lawfully parked on the street, he was accosted, detained, frisked and searched by the defendants, Helmet Klemm and John Doe, acting under color of law, and while the plaintiff was being detained by said defendants, two police squad cars appeared on the scene with the red lights flashing on the vehicles and about six or eight police officers emerged therefrom.

11. As a direct consequence of the acts and conduct of the police officer-defendants herein com-

plained of, the plaintiff was summarily removed and replaced as Personnel Director of the City of Akron, Ohio, on March 21, 1977, by the defendants, Jack Moye, Robert W. Wheeler and Robert D. Harris, acting as the Civil Service Commission of Akron, Ohio, without having filed any charges against the plaintiff, and without according the plaintiff the right to be heard before the defendants terminated his employment and replaced him as Personnel Director.

12. Subsequent to, and as a result of the action of the defendants as set forth in paragraph 11 herein, the plaintiff applied for unemployment benefits from the State of Ohio. In connection with the plaintiff's application for such benefits, the defendants as the Civil Service Commission and the employer of the plaintiff, submitted to the Ohio Bureau of Employment Services a statement that "the claimant (plaintiff) was discharged by the City of Akron, Ohio, on 3/11/77 because his standard of behavior was not what the employer had a right to expect of a public employee". This statement of said defendants was false and the defendants knew it to be untrue at the time it was submitted by them to the said Bureau. Thereupon, the Bureau denied the plaintiff's application for unemployment benefits due to the misrepresentation of the said defendants.

13. The concerted actions of the defendants, as aforestated, are violative of the rights guaranteed to the plaintiff by the Constitution of the United States in the following respects:

a) They violate the right to privacy guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments in that they constitute a disclosure to a large segment of the public of highly personal and confidential information about the plaintiff, and the exhibition of private photographs of an intimate nature which were not and are not connected in any way with the arrest or conviction of the plaintiff, or with any lawful action or process against him.

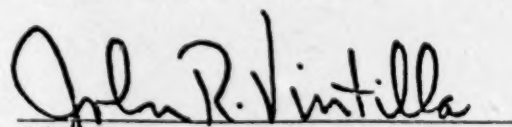
b) They imposed a stigma upon the plaintiff that directly caused his removal from the position of Personnel Director and thereby denied him the equal protection of the law, and deprived him of his liberty interest in his reputation and his property interest in continued employment, and foreclosed the plaintiff's freedom to secure and to enjoy other employment opportunities.

c) They violated the plaintiff's right to be secure in his person against an unreasonable search and seizure as guaranteed by the Fourth Amendment and made applicable to the States by reason of the due process Clause of the Fourteenth Amendment to the Constitution of the United States.

14. As a further consequence of the concerted actions of the defendants in doing the things hereinabove related, plaintiff suffered extreme humiliation and embarrassment, he suffered severe mental anxiety and distress as well as a severe nervous disorder of his entire body following the loss of employment and injury to his good name, reputation and standing in the community, and he was compelled to expend much money in the

procurement and for the services of legal counsel, and otherwise, to protect and to defend against the violations of his rights. As a direct result of the foregoing, plaintiff is suffering and will continue to suffer for the rest of his lifetime from mental distress, humiliation, embarrassment and defamation of his character and reputation, which will, in part, cause him future loss of earnings and restrict his opportunities to hold respected and trusted positions in his employment and community.

WHEREFORE, plaintiff prays that he have and recover judgment from the defendants, and each of them, for compensatory damages, in the sum of \$650,000.00, and exemplary or punitive damages in the amount of \$450,000.00, for reasonable attorney fees for the prosecution of the action and for his costs herein.


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 Cleveland, Ohio 44115
 Attorney for Plaintiff

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION

NICHOLAS BUIAN

Plaintiff

vs.

CLIFFORD BAUGHARD, ET AL.

Defendants

Civil Action C77-267A

ORDER

Presently pending before the Court is the motion to dismiss of defendants Clifford Baughard, George Bland, John Bailey, Helmut Klemm, and John Doe. Upon consideration and for the reasons stated below, said motion shall be granted in part and denied in part.

Invoking the Court's jurisdiction under 28 U.S.C. §1331 and §1343, plaintiff initiated this action for damages to redress alleged deprivations of his constitutional rights in violation of 42 U.S.C. §1983 and §1985.

The plaintiff in the present action is the former personnel director of the City of Akron; the present defendants are members of the Police Department of the City of Akron. Members of the Akron Civil Service Commission are also named defendants and have separately moved to dismiss. Said motion was considered in a separate Order.

Upon defendants' motion to dismiss, the Court is faced with the issue of whether plaintiff has succeeded in sufficiently stating a claim under either or both 42 U.S.C. §1983 and §1985. For the purposes of defendants'

motion, the allegations of the complaint are taken "at face value." California Transport v. Trucking Unlimited, 404 U.S. 508, 515, 92 S.Ct. 609, 614 (1972).

Plaintiff alleges that during the course of a search in connection with a homicide investigation, the defendants located "certain photographs of a private and intimate nature in which the plaintiff appeared." Plaintiff further alleges:

On March 20, 1977, at or about 9 p.m. o'clock while the plaintiff was in pursuit of a personal errand, and, as he was about to enter into his automobile which was lawfully parked on the street, he was arrested, detained, frisked and searched by the defendants, Helmut Klemm and John Doe, acting under color of law, and while the plaintiff was being detained by said defendants, two police squad cars appeared on the scene with the red lights flashing on the vehicles and about six or eight police officers emerged therefrom.

Plaintiff was subsequently cleared of any involvement in the homicide. At sometime thereafter, the police defendants allegedly,

made the photographs of the plaintiff accessible, and/or delivered, and/or exhibited them to the other defendants, and to individuals, at random, and simultaneous therewith, and thereafter, the police officer defendants and the other defendants, improperly and unlawfully disclosed and made known publicly the information about the private and intimate activities and conduct of the plaintiff which was obtained in the course and as a result of the investigation of the aforesaid homicide, all without the knowledge or consent of the plaintiff and in wanton and reckless disregard of the plaintiff's rights.

The complaint further alleges that as a result of the police defendants' actions making said photographs available to the other defendants, "plaintiff was summarily

removed as Personnel Director of the City of Akron, Ohio, by the defendants (members of Civil Service Commission), . . . without having filed any charges against the plaintiff, and without according the plaintiff the right to be heard before the defendants terminated his employment " The defendants, members of the Civil Service Commission, allegedly, subsequently informed the Ohio Bureau of Employment Services that "the claimant (plaintiff) was discharged by the City of Akron, Ohio, on March 11, 1977 because his standard of behavior was not what the employer had a right to expect of a public employee."

Based on the above alleged facts, plaintiff asserts that the defendants' "concerted actions" violated his Constitutional rights as follows:

"a) They violate the right to privacy guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments in that they constitute a disclosure to a large segment of the public of highly personal and confidential information about the plaintiff, and the exhibition of private photographs of an intimate nature which were not and are not connected in any way with the arrest or conviction of the plaintiff, or with any lawful action or process against him.

b) They imposed a stigma upon the plaintiff that directly caused his removal from the position of Personnel Director and thereby denied him the equal protection of the law, and deprived him of his liberty interest in his reputation and his property interest in continued employment, and foreclosed the plaintiff's freedom to secure and to enjoy other employment opportunities.

d) They violated the plaintiff's right to be secure in his person against an unreasonable search and seizure as guaranteed by the Fourth Amendment and made applicable to the States by reason of the due process Clause of the Fourteenth Amendment to the Constitution of the United States."

The Court will initially address plaintiff's assertion of a claim under 42 U.S.C. §1985. Section 1985 proscribes conspiracies to deny a citizen of the equal protection of the laws. See Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790 (1971). Such an action must be founded on class based, invidious discrimination. O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973). As plaintiff's complaint has totally failed to allege a class based animus for defendants' actions, it is insufficient and will therefore be dismissed.

Plaintiff's §1983 action is based on a number of alleged deprivations. The Court will consider said alleged deprivations individually.

Plaintiff asserts that defendants violated his right to privacy by making intimate photographs available to the public. The Court finds that this allegation is insufficient to make out a violation of the Constitutional right to privacy founded upon the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

It is true, as plaintiff argues, that the tort of invasion of privacy is coming into wider recognition. See e.g., Virgil v. Time Inc. 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976). This Court, however, does not believe that the facts here alleged are sufficient to show a constitutional violation of privacy, even if they may be sufficient to show a tortious violation. As the Supreme Court stated in Paul v. Davis 424 U.S. 694, 698-99, 96 S.Ct. 1155, 1159 (1976):

It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every

legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

The Court further stated in Paul, after mentioning search and seizure cases, "our other 'right of privacy' cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment." Paul v. Davis, supra, at 1166. The Court in Paul specifically declined to recognize that an alleged violation of privacy was actionable under §1983. Although it is true that Paul dealt with the publication of "an official action such as an arrest," and the present plaintiff alleges that defendants made "a disclosure to a large segment of the public of highly personal and confidential information about the plaintiff," this Court is not convinced that such disclosure to the public, without more, is a Constitutional violation.

Only one case has been brought to the Court's attention where a §1983 action was allowed for an alleged violation of privacy. York v. Story, 324 F.2d 450 (9th Cir. 1963). In that case, however, the Court was faced with a situation where police officers had not only circulated nude photographs of plaintiff, but had actually taken said photographs, over plaintiff's objections, while purportedly processing a complaint at the police station. While the York case demonstrates the possibility of actions under color of law being so "shocking to the conscience"

that they make out a Constitutional violation of the right to privacy, it does not stand for the proposition that every alleged violation of privacy is a Constitutional violation. The present plaintiff has not alleged that the defendants in any way participated in making the photographs in question or that they did anything more than disclose said photographs to the public. This is not "such a gross abuse of privacy as to amount to an abridgement of fundamental constitutional guarantees." Baker v. Howard, 419 F.2d 376, 377 (9th Cir. 1969). The Court, therefore, holds that if plaintiff has succeeded in alleging facts which set forth a claim against these defendants under §1983, he has done so with his other allegations, not with his allegation of a violation of privacy.

As stated earlier, plaintiff not only alleges that the present defendants made the photographs in question available to the public in general, but that they also made them available to plaintiff's employer, the Akron Civil Service Commission. The Court, in a separate Order, has ruled that plaintiff has succeeded in making out a claim against the members of the Civil Service Commission under §1983 for allegedly dismissing plaintiff without an opportunity to be heard in violation of his property rights. It has further ruled that the members of the Civil Service Commission are subject to a §1983 action for allegedly communicating a reason for plaintiff's dismissal which had the effect of attaching a "badge of infamy" to plaintiff, without affording him an opportunity to be heard, in violation of his liberty interests. Giving plaintiff's complaint the favorable reading required by the Federal

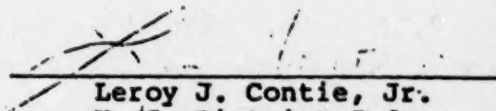
(C77-287A)

Rules of Civil Procedure, it appears that he is alleging that the present defendants acted in concert with the members of the Civil Service Commission in carrying out the above alleged violations. The Court finds this allegation is sufficient to state a claim against the present defendants for conspiring to deprive plaintiff of liberty and property without due process.

Plaintiff's last allegation against these defendants is that they violated his "right to be secure in his person against an unreasonable search and seizure as guaranteed by the Fourth Amendment and made applicable to the States by reason of the Fourteenth Amendment." This assertion is based on defendants' alleged action in detaining and frisking plaintiff on a public street. Given the "favorable reading required by the Federal Rules of Civil Procedure," Scheuer v. Rhodes, 416 U.S. 232, 239, 94 S.Ct. 1683, 1687 (1974), such an allegation is sufficient to state a claim under §1983.

Accordingly, the instant motion is granted as to the §1985 claim and denied as to the §1983 claim.

IT IS SO ORDERED.


Leroy J. Contie, Jr.
U. S. District Judge

District Judge's Instructions To The Jury:

" So, if you get to this issue, you must determine if the plaintiff was wrongfully discharged and if a hearing would have been held he would not have been discharged, in other words, knowing the facts the Commission would not have discharged the plaintiff in a hearing.

Stating it another way, before the plaintiff can recover wages or compensation for any emotional and mental distress for being denied a hearing, you would have to determine that he properly rescinded his resignation and that if granted a hearing thereafter, and based upon all the evidence, the Civil Service Commission would not have relieved him of his duties".

DISTRICT JUDGE'S INSTRUCTIONS TO THE JURY:

THE COURT: Any additions or corrections?

MR. VINTILLA: Well, I have exceptions to much of it. I think the charge is highly prejudicial. . . .

MR. VINTILLA: " and in the Court's charge that we must show that the committee would have had a hearing on disciplinary charges and he would have been exonerated. We take exception there".

CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

NICHOLAS BUIAN)
)
 Plaintiff) Civil Action C77-287A
)
)
 vs.) AMENDED
)
) JUDGMENT
)
 CLIFFORD BAUGHARD, et al.)
)
 Defendants)

The remaining issues having been submitted to the jury and the jury having rendered a verdict in favor of the defendant Helmut Klemm and against the plaintiff Nicholas Buian and in favor of the plaintiff Nicholas Buian and against the defendants Jack Moye and Richard W. Wheeler;

IT IS FURTHER ORDERED that the defendants JACK MOYE and ROBERT W. WHEELER bear the costs of this action.

Leroy J. Contie, Jr.
U. S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
MAY 9 1 14 PM '78
CLERK OF COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NICHOLAS BUIAN,

Plaintiff,

-vs-

CLIFFORD BAUGHARD, et al.,

Defendants.

)
)
) CIVIL NO. C 77-287 A
)
)

) PLAINTIFF'S MOTION
) FOR ADDITUR AND/OR
) MOTION FOR NEW TRIAL
) WITH MEMORANDUM
) OF LAW
)

Plaintiff shows the court as follows:

1. On April 28, 1978, the jury returned a verdict in favor of the plaintiff, Nicholas Buian, and against the defendants, Jack Moye and Robert Wheeler, and awarded the plaintiff One Dollar (\$1.00) in nominal damages, and Six Hundred Fifty Dollars (\$650.00) in punitive damages against said defendants.

2. The evidence is uncontroverted and undisputed that the plaintiff lost his salary and other pecuniary benefits as Personnel Director for the period between March 21, 1977, and the date of the jury's verdict on April 28, 1978, in the amount of Thirty-eight Thousand Nine Hundred Seventy-seven Dollars (\$38,977.00).

3. The evidence is uncontroverted and undisputed that based on plaintiff's exceptional and outstanding performance of the position of Personnel Director

damages against the defendants.

2) In insisting repeatedly during the trial that, in order to recover damages as a result of procedural due process violations of his rights, the plaintiff must prove that had the Civil Service Commission accorded him a hearing before terminating him as Personnel Director the plaintiff would have prevailed against the said Commission.

3) In improperly charging the jury on the proposition set forth in subparagraph 2) hereinabove.

4) In improperly instructing the jury on nominal damages and injecting it as an issue in this case.

5) In improperly instructing the jury that the plaintiff is limited to the recovery of damages for the loss of his salary between March 21, 1977 and April 28, 1978, in the event it should find in favor of the plaintiff and against the defendants.

6) In refusing to give the jury instructions submitted by the plaintiff.

7) In failing or refusing to charge the jury on the instructions submitted by the plaintiff which the court approved and indicated would

Dollars (\$38,977.00) for the period between March 21, 1977, and April 28, 1978, and to render a judgment against said defendants in the amount of Three Hundred Sixty-two Thousand Thirteen Dollars (\$362,013.00) for the period subsequent to April 28, 1978 and January 1, 1985.

In the alternative the plaintiff moves the court to set aside the verdict of the jury and judgment entered thereon with regard to the award of nominal damages and punitive damages only, and to grant plaintiff a new trial on damages for any or all of the following reasons:

a) The verdict with regard to damages of One Dollar against the defendants, Jack Moye and Robert Wheeler, is contrary to law.

b) The aforesaid verdict is contrary to the uncontroverted and undisputed evidence.

c) The verdict with regard to punitive damages is grossly inadequate and unreasonable in view of the evidence and, therefore, contrary to law.

d) This Honorable Court erred during the course of the trial in the following respects:

1) In permitting the introduction of evidence concerning the private activities and life of the plaintiff over the repeated objections of the plaintiff, all of which prejudiced the jury in its consideration of the assessment of

during the entire period of his employment as revealed by the record, the plaintiff would have continued in the office until January 1, 1985, during which time he would have earned and received the sum of Three Hundred Sixty-two Thousand Thirteen Dollars (\$362,013.00) as salary and pecuniary benefits accruing thereto.

4. The verdict of the jury in favor of the plaintiff requires a finding as a matter of law that plaintiff is entitled to damages at least in the amount of Thirty-eight Thousand Nine Hundred Seventy-seven Dollars (\$38,977.00) for the loss of salary and pecuniary benefits from the date of the unlawful termination of the plaintiff as Personnel Director on March 21, 1977, to the date of the jury verdict herein on April 28, 1978.

5. The jury verdict in favor of the plaintiff requires a finding as a matter of law that the plaintiff is entitled to additional damages in the amount of Three Hundred Sixty-two Thousand Thirteen Dollars (\$362,013.00) for the loss of salary and pecuniary benefits from April 28, 1978 to January 1, 1985.

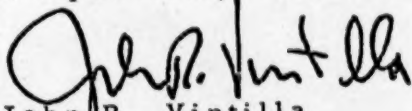
WHEREFORE, plaintiff moves the court to set aside the verdict entered herein for damages of One Dollar (\$1.00) against each of the defendants, Jack Moye and Robert Wheeler, on April 28, 1978, and the judgment entered thereon by the court on May 2, 1978, and to render a judgment against said defendants in the amount of Thirty-eight Thousand Nine Hundred Seventy-seven

be given to the jury.

8) In improperly instructing the jury with regard to the plaintiff's Fourth Amendment rights as secured to him by the Constitution of the United States.

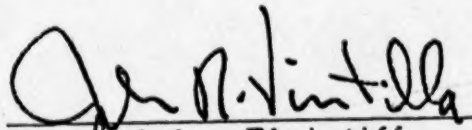
9) In dismissing defendant, George Bland, as a defendant.

Respectfully submitted,


John R. Vintilla
Attorney for Plaintiff

Proof of Service

A copy of the foregoing motions and memorandum of law was mailed to counsel of record herein this 10th day of May, 1978.


Counsel for Plaintiff

CONTIE, J.

CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NICHOLAS BUIAN

Plaintiff

vs.

CLIFFORD BAUGHARD, et al.

Defendants

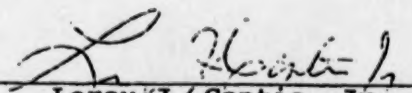
Civil Action C77-287A

ORDER

This cause came on to be heard on the motion of the plaintiff for an order directing that the verdict of the jury be set aside and that the Court render judgment in favor of the plaintiff and against the defendant for the sum of \$38,977.00, and that the Court further render judgment in favor of the plaintiff and against the defendant for the sum of \$362,013.00. The Court finds that said motion is not well taken and it is hereby overruled.

This cause came on for further hearing on the motion of the plaintiff for an order directing that the Court set aside the verdict of the jury and grant the plaintiff a new trial. The Court finds that said motion is not well taken and it is hereby overruled.

IT IS ORDERED, ADJUDGED AND DECREED that the motions of the plaintiff for additur and in the alternative for a new trial are hereby overruled.


Leroy J. Contie, Jr.
U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAN 7 1979

JOHN P. NEWMAN, Clerk

O R D E R

NICHOLAS BUIAN,

Plaintiff-Appellant

V.

CLIFFORD BAUGHARD, GEORGE BLAND,
JOHN RILEY, HELMUT KLEMM, JOHN DOE,
JACK MOYE, ROBERT W. WHEELER and
ROBERT D. HARRIS,

Defendants-Appellees

Before: EDWARDS and ENGEL, Circuit Judges and DeMASCIO, District
Judge*

Nicholas Buian appeals, on grounds of inadequacy, a judgment upon a jury verdict in his favor in his civil rights action against two members of the Civil Service Commission of the City of Akron, commenced under 42 U.S.C. §1983. The jury awarded him \$650 in punitive damages and \$1.00 in nominal damages against each defendant. Buian also claims that the district court erred in dismissing, prior to trial, certain claims against four officers of the City of Akron, alleging a violation of his privacy.

Appellant makes no claim that the trial court erred in its instructions to the jury or in its rulings upon the evidence during the course of the trial.

Upon a careful review of the entire record on appeal, the court is of the opinion that the district judge

*Hon. Robert E. DeMascio, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

correctly submitted the case to the jury upon proper instructions, and that the trial court's instructions and the jury's verdicts were consistent with the evidence and with the standards of Carey v. Phipps, 435 U.S. 247 (1978).

With respect to the police officer-defendants, Buian's alleged cause of action sought relief, not under the law of Ohio, but under 42 U.S.C. §1983. In that context the court finds that there was no error in the dismissal of his claims. Any disclosure of the plaintiff's conduct, as embarrassing as it might have been, concerned activity of the plaintiff at a time and place in which he had no reasonable or lawful expectation of privacy, and the court therefore finds that the trial court's dismissals pertaining to those defendants was consistent with the principles set forth in Paul v. Davis, 424 U.S. 693 (1976). Buian's claims, therefore, were outside any constitutionally protected zone of privacy and consequently did not entitle him to relief under Section 1983. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Newman
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NICHOLAS BUIAN,

Plaintiff-Appellant

O R D E RFILED

FEB 6 1979

V.

CLIFFORD BAUGHARD, GEORGE BLAND,
et al.,

Defendants-Appellees

JOHN P. HEHMAN, Cler'

Before: EDWARDS, Chief Judge, ENGEL, Circuit Judge, and
DeMASCIO, District Judge*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiff-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit. Accordingly,

The petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

*Hon. Robert E. DeMascio, District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

DISTRICT JUDGE'S SIDE BAR REMARKS RE EVIDENCE ON DAMAGES.

"(From) opening statement there was evidence submitted in this case about the loss of earnings, and there wasn't an objection one time until just a moment ago (which was overruled)".

" . . . Also evidence has been entered relative to this (loss of earnings) all over the place".

42 U. S. C., Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

Section 1988 of Title 42 of the United States Code:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.